Supreme Court, U. S.
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In the

Supreme Court

of the

United States

No. 78-1761

ORRIS BALLARD, LAWRENCE BALLARD,
SERGE GAUDRY AND DONALD RUSSELL,

Petitioners,

-v-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

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-v-

PEOPLE OF THE STATE OF ILLINOIS, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Petitioners, Orris Ballard, Lawrence Ballard, Serge Gaudry and Donald Russell, prays that a Writ of Certiorari be issued to the Illinois Appellate Court, Second District for review of the judgement of that Court in this case.
(Opinion Appendix A.1).

A. OPINION BELOW

The opinion of the Illinois Appellate Court, with one judge dessenting, is reported at 22 Ill. Dec. 410 and is attached as Appendix A. The Illinois Supreme Court denied the timely Petition of Leave to Appeal in an unreported order, attached as Appendix B.

B. STATEMENT OF JURISDICTION

(i) The petition is timely filed within ninety days of the Illinois Supreme Court's January 25, 1979 order denying the Petition for leave to Appeal.

(ii) There has been no petition for rehearing or request for an extension of time within which to petition for certiorari.

(iii) Jurisdiction is conferred by Title 28 U.S. Code, 1257 (3)

C. QUESTIONS PRESENTED FOR REVIEW

Whether the defendants were denied the right to affective counsel after the trial court refused to permit the attorney for two co-defedants to withdraw. Whether the indictment adequately informs the defendants of what they are charged so as to comply with the requirements of due process.

D. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the ''right to counsel'' clause of the Sixth Amendment to the United States' Constitution and the ''due process'' clause of the Fifth and Fourteenth Amendment to the United States' Constitution.

E. STATEMENT OF THE CASE

The defendants were indicted in this case through an indictment which reads:

> That on or about the 27th day of December, 1972, in the County of Winnebago and State of Illinois, ORRIS BALLARD, LAWRENCE BALLARD, SERGE GAUDRY, DONALD RUSSELL committed the offense of theft, in that they knowlingly

> obtained by deception, control over property of the owner, to wit: an amount of money exceeding $150. belonging to Max Boynton, with the intent to deprive Max Boynton, permanently of the use and benefit of the property, in violation of Paragraph 16-1, Chapter 38, Illinois Revised Statues, (1971) as amended.''

The attorney for the defendant commenced representation approximately five (5) months before trial. Approximately one (1) week before trial, counsel for the defendants recognized from the court that he was aware that a conflict had developed between two (2) of the co-defendants. He requested permission to withdraw. The trial court stated that he felt that the motion was dilatory and denied the motion. However, at no time prior to a trial had counsel ever requested a delay in the commencement of the trial proceedings. The motion was denied and counsel was then obligated to carry forth his representation of two co-defendants. At trial the State put forward a great deal of evidence that one of the co-defendants was the ''brains'' of the fraud scheme while the other co-defendant was a ''hapless lacky''. Both co-defendants were convicted and each was sentenced to terms of imprisonment from two to eight years.

F. STAGE AT WHICH FEDERAL QUESTION WAS RAISED

The defendants filed post trial motions attacking the indictment which were denied.

The manner in which the motion to withdraw was dealt with by the trial court appears in the opinion of the Appellate Court.

G. REASONS FOR ALLOWANCE OF THE WRIT

Effective assistance of counsel is perhaps the most important right a defendant has. The trial court completely disregarded the guidelines set forth in Holloway v. Arkansas (1978), _____ U.S. _____, 55 L. Ed. 2d 426, 98 S. Ct. _____, thus denying the defendants that very important right. The Appellate Courts resolution of that question involves an important yet unanswered question, namely whether the tardy nature of the motion to withdraw will defeat a defendants right to effective assistance of counsel.

The only two cases deciding the sufficiency of a theft by deception indictment are the present case and State v. Kesterson (Mo.1966), 403 S.W. 2d 606. They reached deametrically opposite results. While admittedly a narrow point it is one not heretofore considered.

H. CONCLUSION

For the compelling reasons stated above, petitioner requests that a writ of certiorari be allowed to resolve the substantial federal question presented.

Respectfully submitted,

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APPENDIX A

No. 76-565

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellee V. ORRIS BALLARD, LAWRENCE BALLARD, SERGE GAUDRY AND DONALD RUSSELL, Defendants - Appellants.	Appeal from the Circuit Court of the 17th Judicial Circuit, Winnebago County, Illinois

MR. JUSTICE WOODWARD delivered the opinion of the court:

Defendants, Orris Ballard, Lawrence (Larry) Ballard, Serge Gaudry and Donald Russell were indicited and charged with 15 counts of theft by deception (Ill. Rev. Stat.; 1971, ch. 38, par. 16-1). Following a jury trial, defendants Orris and Larry Ballard and Gaudry were found guilty on 12 counts and were each sentenced to two to eight years imprisonment. Defendant Russell was found guilty on four counts; he is not a party to this appeal. Defendants Orris and Larry Ballard and Gaudry appeal from the jury's verdict and the sentences imposed by the trial court.

The charges arose from an alleged fraudlent scheme involving the sale of distributorships by defendants to purchasers, referred to as

investors. At trial 13 witnesses testified that each had purchased a distributorship from a company named American International Tool Company (hereafter AITC). After seeing a newspaper advertisement, the witnesses met with either Larry Ballard or Donald Russell who sold the distributorships. Serge Gaudry was president of AITC and Orris Ballard acted as consultant and participated in one or two of the sales. The distributorships were sold for amounts varying between $3000 and $8500. The witnesses signed written contracts which promised that the marketing department of AITC would obtain locations for the placement of the tools, generally 20-40 accounts or locations. Other written and oral promises were made as follows: 1) Large profits could be made because there was a ⅓ markup for the retail store and ⅓ markup for the investor; 2) the company would furnish locators, who would set up accounts and locations to place the tools and other merchandise in high volume retail outlets; 3) the tools and other merchandise would be of the same high quality which the salesmen demonstrated to the investor; 4) a refund of the investment would be paid within one year after the contract if either party desired to cancel, subject to certain adjustments for inventory outstanding.

According to the witnesses, however, once the money was paid to defendants, they received small amounts of merchandise, often of poorer quality than had been represented; that while the accounts and locations were set up, the tools and other merchandise did not sell and the locations were not of the quality represented. The witnesses' complaints went unsatisfied. While one witness did report that her distributorship made some profit for a time, the other 12 testified that they made no money from the investment, and none of them received a refund when requested from defendants. Ultimately they were notified by letter that AITC had gone out of business.

Serge Gaudry, testifying for the defense, explained the theory of the business as follows:

> '' ***Well, it seemed to me if I was going to have a successful business, that I had to have some kind of an incentive for my distributors to go out there and perform. So, I thought if I would take a deposit from them of $4,000.00, $5,000.00, $8,000.00, and told them that I would give that deposit back to them at a rate of 10% on their reorders, that gave me two things. First of all, they would keep buying from me. If I was holding that money the only way they would get it back by buying products from me. They would always come back and that's where once I set them up in business they could go and find their own source of things and in that way they always would come back to me and that gave them incentive to go out and promote their sales,

> ***
>
> Well, what I intended to do was build a network of successful distributors, maybe build it up to a hundred, two hundred distributors; with that many that would give me a volume of business big enough that I could pay a cheap enough price. I would also realize a nice profit on reorders; my people, distributors would realize a nice profit and I could make a living and that's what I had in mind.''

According to Gaudry, the company's ultimate failure was due to his lack of business experience; that the business was under captialized; there was not sufficient reorder to pay refunds as the demands came in; finally, the product simply did not sell.

The frst issue on appeal is whether the indictment was valid. Defendants contend that the failure of the indictment to set forth the acts of deception rendered it fatally defective. The indictment reads as follows:

> '' That on or about the 27th day of December, 1972, in the county of Winnebago and State of Illinois, ORRIS BALLARD, LAWRENCE BALLARD, SERGE GAUDRY, DONALD RUSSELL committed the offense of theft, in that they knowlingly obtained by deception, control over property of the owner, to wit: an amount of money exceeding $150. belonging to Max Boynton, with the intent to deprive Max Boynton, permanently of the use and benefit of the property, in violation of Paragraph 16-1, Chapter 38, Illinois Revised Statutes, (1971) as amended.''

Each of the 14 succeeding counts alleged theft by deception in the same manner as alledged in the count above, except as to the date of the offense and the owner of the property.

The purpose of an indictment is to appraise a defendant of the exact crime with which he is charged so that he may prepare his defense, and may plead the judgment in bar of a subsequent prosecution for the same offense. (People v. Smalley (1973), 10 Ill. App. 3d 416, 294 N.E. 2d 305.) It is well established that an indictment phrased in the language of the statute creating the crime is sufficiently certain where the words of the statute so particularize the offense by their use alone as to notify the accused of the precise offense charged against him. But where the statute does not specifically define the crime or does so only in general terms, some act showing an alleged violation of the statute must be averred. People v. Grieco (1970), 44 Ill. 2d 407, 409-410, 255 N.E. 2d 897, 899.

In People v. Grieco, defendant was charged with battery in an ndictment which read as follows:

> "*** Joseph Grieco ***, committed the offense of battery, in that they, intentionally and knowlingly, without legal justification, committed a battery on George Quarnstrom which caused great bodily harm to Said George Quarnstrom, in violation of ch. 38, sec. 12-3, of the Ill. Rev. Stats., 1963, ***"

In holding that the indictment there met the test for certainty our supreme court pointed out that the term "battery" was one of common usage and understanding, and while the indictment was phrased in the language of the statute, the statute itself set forth all elements necessary to constitute the offense intended to be punished. Coupled with the allegations setting forth the name of the person upon whom the battery was committed and the date it occurred, the indictment was sufficiently certain to enable defendant to prepare a defense and to permit any judgment entered to be pleaded in bar of a subsequent indictment for the same offense.

Applying this reasoning to the case before us, the indictment here is phrased in the language of the statute which sets forth all the elements necessary to constitute the offense intended to be punished. The word "theft" is a word commonly understood; moreover, the indictment particularizes the charge as theft by deception. The indictment also sets forth the names of the persons whose property was taken as well as the approximate date when the thefts occurred. Moreover, a motion for a bill of particulars was available to defendants; while defendant Russell's motion for such a bill was denied, no request for one by the remaining defendants, represented by other counsel, was ever made. As a practical matter, the record demonstrates no difficulty in preparing and presenting a defense and clearly the indictment is sufficient to support a plea of double jeopardy should the need arise. People v. Grieco.

We have examined the cases relied on by defendants on this issue, principally People v. Leach (1972), 3 Ill. App. 3d 389, 279 N.E. 2d 450; People V. Aud (1971), 1 Ill. App. 3d 867, 276 N.E. 2d 97; and State v. Kesterson (Mo. 1966), 403 S.W. 2d 606. However, in those cases the court found that indictments phrased in the language of the statute were not sufficient where the indictment did not give a defendant notice of the crime with which she was charged (Leach); where the statute itself did not set forth all the elements of the offense and there were no other allegations in the indictments from which defendants could definitely ascertain what acts they were charged with (Aud); and where it would not be sufficient to bar futher prosecution for the same offense (Kesterson).

It is the policy of our modern courts to disregard mere technical objections and require only that the indictment state the essential elements of the offense; whether an indictment sufficiently charges an offense does not depend on nice attention to technicalities of pleadings or formalistic recital of allegations. (People v. DePratto (1976), 36 Ill. App. 3d 338, 343 N.E. 2d 628.) As the indictment in the case before us fulfills the requiremnts outlined above, we hold that the failure of the indictment to specifically allege the various acts of deception does not render it invalid.

Next, defendants contend that the state failed to prove them guilty beyond a reasonable doubt. As outlined above, 13 complaining witnesses testified as to the promises both oral and written made to them by defendants and the failure to provide refunds of the investment. On the other hand defendants contend that while they intended the business to be successful, due to the reasons referred to earlier, the business failed.

Defendants correctly point out that failure to perform the promise or promises standing alone is not evidence that the offender did not intend to perform, and that the state has the burden or proving that the defendants made their various promises knowing either that they did not intend to perform the promises or that they would not be performed as promised. Ill. Rev. Stat. (1971), ch. 38, par. 15-4(e).

There was testimony from one investor that for a time her distributorship make a profit and the trial court granted defendants' motion for a verdict of acquittal as to that count. However, the testimony from the remaining 12 complaining witnesses was replete with examples of defendants' failure to furnish the locations and merchandise of the quality promised; their refusal to deal with the complaints of their investors; and their refusal to provide the refunds as promised.

Specific intent to defraud need not be proved by direct evidence but may be proved by the surrounding facts and circumstances; further the factual issues are for the jury to determine and the jury's finding will not be disturbed unless the proof does not meet the requirements of the law. (People v. Warren (1971), 2 Ill. App. 3d 983, 276 N.E. 2d 92.) In Warren, defendant was found guilty of theft by deception in connection with an agreement he had entered into with two investors to purchase interests in an oil well from defendant's oil company. Each of the investors claimed that they were then induced to enter into a new agreement for interests in two other oil wells, on the basis of defendant's alleged representation that the first wil would be a productive one. The reviewing court there found that defendant had performed according to the promises in the agreement and that his representations of productivity of the first oil well, while both premature and contrary to later developemnts did not render his

conduct unlawful. However, in the case before us the evidence clearly showed that defendants here did not even attempt to honor their promises to their investors; there was sufficient evidence to infer that the failure of defendants' enterprise came not from over enthusiasm or business "naivete", but that the promises made were never intended to be fulfilled. Therefore, we hold that here was sufficient evidence to find the defendants guilty beyond a reasonable doubt.

Next, defendants contend that Joseph Spiezer, attorney for Orris Ballard and Serge Gaudry should have been permitted to withdraw his representation from one or the other of them. on February 9, 1976, one week before the trial of this case was to commence, attorney Spiezer filed a motion to withdraw as attorney of record. The motion alleged in pertinent part:

> " 3. That JOSEPH P. SPIEZER has become aware of conflict of interests among the defendants and does not feel he can represent all defendants in this case.
>
> 4. That the defendant, ORRIS BALLARD, has not cooperated with JOSEPH P. SPIEZER and therefore JOSEPH P. SPIEZER does not feel that he can adequately represent the defendant without his cooperation. ***"

The motion was heard on February 16, 1976, the day of trial. At that time the following colloquy occurred:

> " MR. SPIEZER: The problem I have, the first motion is in regard to Mr. Ballard is that recently a conflict has arisen. I don't know how I can explain them without prejudicing you Honor. In the beginning --
>
> THE COURT: Don't prejudice me, I will deny your motion. I have read the motion and I don't think it is well founded. This case has been continued, continued, continued, continued. I believe these are nothing more than harrassing motions to stall the trial. *** Motion to withdraw is denied. ***"

During the course of the trial attorney Spiezer again brought up the question of a possible conflict of interest between the defendants. At that time the following colloquy took place:

> " MR. SPIEZER: The problem is, Judge, I am representing Mr. Gaudry and Mr. [Orris] Ballard, and I have filed the motion

previously. There may be some conflict, I think clearly a conflict has arisen and I am really concerned about what to do. On the witness stand in the State's examination, Mr. Gaudry, they have been dropping hints, more than dropping hints, they have been saying Ballard was, Orris Ballard was the ''brains behind the operation''. In my office Mr. Gaudry has maintained that no, he is, he said he was in charge.

THE COURT: I fail to see how that has been antagonistic to Orris Ballard.

MR. SPIEZER: My problem is, that things come out on the witness stand that do not come out perhaps in the lawyer's office. At this point in time I am not sure, but that perhaps Orris Ballard was the brains behind the operation so to speak, and if that is true, I have the obligation to go to Serge Gaudry and tell him, stick the finger at Orris. I can't do that because I represnet Orris, *** I think there is a clear conflict and I should withdraw from somebody. Frankly, I would prefer to withdraw from Orris Ballard. ***

THE COURT: The trial at the stage we are at, I can't at this time allow you to withdraw and let Mr. Ballard defend himself. ***

MR. SPIEZER: My problem, what happens if tonight I talked to Serge, well, yes, it wasn't the truth. *** If the witness tells me I was covering for my father-in-law, you know, I feel bad about it.

THE COURT: Then you come and see me. *** This indictment was brought back in August as I recall, and you had since August to talk to these people, I presume you have talked to him many times.

MR. SPIEZER: Too often, Judge, ***''

The United States Supreme Court recently considered the issue raised here in the case of Holloway v. Arkansas (1978). _____ U.S. _____ , 55 L. Ed. 2d 426, 98 S. Ct. _____ . In Holloway, the three defendants were charged with robbery and rape; on August 5, 1975 the trial court appointed Hall, a public defender, to represent all three; on August 13, Hall moved the court to appoint separate counsel because the defendants had stated to him that there was a possibility of a conflict of interest in each of their cases. After a hearing on the motion the trial court denied it. On September 4, prior to the impaneling of the jury, Hall renewed the motion ''on the grounds that one or two of the defendants may testify and if they do, then I will not be able to cross-examine them because I have received confidential information from them.'' The motion was again denied. During the trial hall advised the court that all three defendants had decided to testify and that as a result he would not be alble to cross-examine any of them Nor, as it turned out, was Hall able to conduct any direct examination of the defendants; each defendant proceeded to give unguided alibi testimony. On appeal to the Arkansas supreme court [(Ark. 1976), 539 S.W. 2d 435)] the court observed that Hall had failed to outline to the trial court both the nature of the confidential information received from his clients, and the manner in which knowledge of that information created conflicting loyalties. Because none of the petitioners had incriminated co-defendants, the court concluded that the record demonstrated no actual conflict of interst or prejudice to the petitioners and affirmed their convictions.

On appeal, the United States Supreme Court reversed and remanded. The Court noted that trial counsel's motions had focused explicitly on the probable risk of a conflict of interest and that the trial court then failed either to appoint separate cousel or take adequate steps to ascertain whether the risk was too remote to warrant separate counsel and held that the failure in the face of representations made by trial counsel before trial and again before the jury was impanelled, deprived petitioners of the guarantee of ''assistance of counsel.'' To the argument that Hall might have presented a more vigorous request for separate counsel, in greater detail, the Court responded that the trial court hardly encouraged the pursuit of the separate counsel claim and Hall would have been confronted with a risk of violating by more disclosure his duty of confidentiality to his clients.

However, more important for the case before us, the Court went on to state:

> '' *** When an untimely motion for separate counsel is made for dilatory purposes, our holding does not impair the trial court's ability to deal with counsel who resort to such tactics. (citations) Nor does our holding preclude a trial court from exploring the adequacy of the basis of defense counsel's represnetations regarding a conflict of interests without improperly requiring disclosure of the confidential communications of the client. (citations) In this case the trial court simply failed to take adequate steps in response to the repeated motions, objections and representations made to it, and no prospect of dilatory practices was present to justify that failure.'' (Emphasis ours) (_____ U.S. _____ , _____ , 55 L. Ed. 2d at 436, 98 S. Ct. _____ , _____.)

In the case before us, the first indication of a possible conflict of interest came when attorney Spiezer filed his motion to withdraw on February 9, 1976, one week before trial; the motion was heard on February 16, the day trial began. Attorney Spiezer had represented defendants Orris Ballard and Serge Gaudry since their arraignment the previous September; the trial date had been reset several times. The trial court itself expressed on the record that it felt the motion was a mere delaying tactic.

Defendants contend that the trial court denied the motion without permitting attorney Spiezer to explain the basis for the alleged conflicting and inconsistent defenses. The trial court did rather abruptly cut off discussion on the motion but only because attorney Spiezer indicated he might be revealing information which might prejudice the trial court. Considering both the motion to withdraw and the discussion between the trial court and attorney Spiezer at the time of the hearing, it is apparent that all attorney Spiezer was prepared to present were some vague and ill defined suspicions that a conflict of interest might arise. Then, during the trial when attorney Spiezer again alluded to a ''possible'' conflict that ''could'' arise the trial court indicated that if the conflict did arise the attorney should again consult with the trial court. Since no further reference to this ''possible conflict'' appears in the record, it is only fair to assume that an actual conflict never developed; it was only after trial that the supposed conflict is again raised.

Unless a defendant properly establishes that a conflict of interst actually exists or becomes apparent during trial, the court should not indulge in speculation to determine whether separate counsel in the interests of justice is required. (People v. Thompson (1977), 51 Ill. App. 3d 53, 366 N.E. 2d 375.) Unlike the situation in Holloway where the trial court was advised well in advance as to the nature of the conflict that had arisen, here the trial court on the date of trial was first presented with only a vaguely defined ''possibility'' of a conflict arising, which amounted to no more than speculation on the part of attorney Spiezer who had represented the defendants for at least six months. Unlike Holloway, the trial court here stated that if a conflict actually existed, the attorney should consult with the trial court if the actual conflict developed. Finally, the Supreme Court made it clear that in Holloway there was no prospect of the motion to withdraw being utilized as a delaying tactic (emphasis ours); the record is much different here.

We here conclude that the motion to withdraw, coming as it did at the time the trial was to commence and months after indictment and Spiezer's representation of the defendants, was untimely; that in view of the speculative nature of trial counsel's fears concerning a conflict of interest, the trial court took adequate steps in dealing with the motion, both at the hearing on the motion and again when the issue was raised at trial. Therefore we hold that the trial court did not err in denying the motion to withdraw.

Next defendants contend that the trial court committted reversible error when it refused to grant their motions for separate trials. The governing principle is that persons jointly indicted should be tried together unless their defenses are so antagonistic that a severance is necessary to insure a fair trial. (People v. Henerson (1976), 39 Ill. App. 3d 164, 351 N.E. 2d 225.) The decision as to whether separate trials should be granted is a matter for the trial court's discretion. People v. Davis (1976), 43 Ill. App. 3d 603, 357 N.E. 2d 96.

Defendants maintain that in the present case such antagonistic defenses were apparent. They argue that as intent was a major contested issue, in order to show his own freedom from guilt, any of the defentants could have presented evidence to show that full knowledge of the operations was solely within the knowledge of one of

the other defendants. it is asserted that this theory was not advanced by any of the defense attorneys; therefore separate trials should have been granted.

The allegation of antagonistic defenses is not supported by the evidence. Mere apprehension that defenses may prove antogonistic without a showing that such apprehensions are well founded is an insufficient ground for severance. (People v. Davis.) During argument on defendant Russell's motion for severance, the attorney for Orris Ballard and Serge Gaudry commented:

Defendants rely on People v. Romero (1975), 31 Ill. App. 3d 704, 334 N.E. 2d 305, affirmed 66 Iil. 2d 325, 362 N.E. 2d 288. There the appellate court determined that a planned burglary of a sporting goods store as opposed to the burglary of a house, in a different city, approximately 24 hours after the burglary charged in the indictment, was not of such a similar nature as to fit the similarity requirement so as to allow evidence as to the planned burglary to show intent or common deisgn. in the case before us defendants contend the following dissimilarities defeat the similarity requirement: that the other transactions occurred 6 to 18 months after the last date alleged in the indictment; different companies were involved while the 13 complaining witnesses were all involved with AITC; no direct connection was made between these companies and AITC; and in two of the ventures no refunds were promised.

We agree with the dicision in People v. Romero in light of the facts there. There is however, a sizable difference in comparing the commission of the two burglaries, and comparing the establishment of several allegedly fraudulent business schemes. While 24 hours separating two burglaries may render them too remote, the time element must of necessity be longer to establish businesses the size of those outlined in the testimony. It is true that different named companies and merchandise other than tools were involved in these transactions and refunds were not promised in all instances; however, the testimony revealed that the basic ingredients of defendants' scheme in this case were contained in these other transactions. Nor is the fact that none of these other companies were themselves connected with AITC of any particular relevance. Therefore we conclude, with due regard for People v. Romero, that the case before

us is factually distinguishable from that case, and we hold that the admission of evidence of the other transactions of similar design was not error.

Next, defendants contend that they were deprived of a fair trial due to the cumulative effect of errors committed at trial.

We have carefully examined these allegations of error and the arguments of both sides. We need not prolong this opinion with a discussion of each error individually. This was a two week trial involving four defendants and a multitude of witnessses and evidence for both sides as evidenced by the 2500 pages of testimony. Given the length of the proceedings, as even the state would concede certain errors did occur. However, we are of the opinion upon reviewing the trial as a whole, that no single error committed warrants reversal, nor do we agree with defendants' contention that their cumulative effect warrants reversal of the decision in this case. A conviction will not be reversed merely because error has been committed by the trial court unless it appears that real justice has been denied or that the verdict of the jury may have resulted from such error. (People v. Sanchez (1973), 11 Ill. App. 3d 1079, 297 N.E. 2d 230.) In view of the amount of competent, relevant evidence of defendants' guilt introduced at trial, the guilty verdict returned by the jury could not be attributed to the cumulative effect of any trial errors.

Finally, defendants Larry Ballard and Serge Gaudry contend that their sentences are excessive. Larry and Orris Ballard and Gaudry each received sentences of two to eight years imprisonment. While Orris Ballard had a previous conviction for one count of mail fraud and one count of wire fraud in federal district court, neither Larry Ballard nor Gaudry had any prior offenses and each had made application for probation. Defendants contend that the trial court's sole concern in imposing these sentences was the magnitude and seriousness of the offense, and gave no consideration to the potential for rehabilitation of these defendants as evidenced by the optimistic pre-sentencing reports.

Immediately prior to imposing sentence, the trial court stated:

> " This case has been a protracted case, an unusual case. The jury heard much testimony and they found three of the defendants guilty on Twelve (12) Counts and one defendant

on Four (4) Counts. *** There was theft in addition to this of some $362,000.00 or thereabouts, *** As to ORRIS BALLARD, LAWRENCE BALLARD, SERGE GAUDRY, it is the conclusion of this Court that the seriousness of the offense, the nature and circumstances of the crime leave me no other alternative except to impose a sentence of imprisonment. ***"

The trial court's exercise of judicial discretion in imposing sentence will not be disturbed on appeal absent an abuse of such discretion. (People v. Perruquet (1977), 68 Ill. 2d 149, 368 N.E. 2d 882.) In People V. Waud (1977), 69 Ill. 2d 588, 373 N.E. 2d 1, our supreme court held that the trial court had not acted arbitrarily in refusing to grant probation to a defendant because the sentencing court believed that the imposition would have deprecated the serious nature and extent of the crimes. The supreme court stated:

"*** A crime need not be one of violence before it can be considered serious. The facts that a defendant has led a good life prior to his or her shortcomings and is not likely to repeat his or her failures again are factors to be considered by the trial court, but they are not conclusive factors. The State does not have a burden of producing empirical data to support the trial court's conclusion that probation will deprecate the seriousness of the offense. The court may reach such determination by examining all of the surrounding circumstances and drawing the reasonable inferences therefrom. *** (69 Ill. 2d at 595-596, 373 N.E. 2d 1, 4.)

There was a lengthy presentencing hearing in which matters in aggravation and mitigation were heard. The sentences imposed were within the statutory limits. Considering the complete record we can not say that the impositon of these sentences on these defendants was an abuse of discretion.

At the time of oral argument of this case, the defendants filed a motion to stay our decision in this case pending the decision of our supreme court in People v. Massarella (Docket No. 50113). In People v. Massarella (1977), 53 Ill. App. 3d 774, 368 N.E. 2d 507, The Appellate Court for the First District held that the Attorney General's common law powers were not so broad as to allow him to take

exclusive charge of the defendant's prosecution for conspiracy, theft and perjury, that the Attorney General is statutorily limited to assisting the state's attorney, upon request only. Like the defendant in Massarella, the defendants here were prosecuted by the Attorney General only.

However, the supreme court has now reversed the appellate court decision (see People v. Massarella (Docket No. 50113, Sept. Term 1978) holding that in the absence of any objection by the state's attorney, the Attorney General is within the scope of his duties in conducting the prosection of such cases and in appearing before the grand jury. On the basis of the supreme court's decision in Massarella, the Attorney General's prosecution of the defendants here, absent any objection from the state's attorney of Winnebago County, was proper.

The judgement of the circuit court of Winnebago County is therefore affirmed.

AFFIRMED

SEIDENFELD, P.J., and RECHENMACHER, J., concur.

United States of America

State of Illinois, }
Appellate Court, } ss.
Second District, }

I, LOREN J. STROTZ, *Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of Certain Proceedings of the said Appellate Court in the above-entitled cause of record in my office.*

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State, this 20th *day of* October, *A.D. 19* 78.

Clerk Appellate Court, Second District

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

January 25, 1979

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Rockford, IL 61101

No. 51483 -People State of Illinois, respondent, vs. Orris Ballard, et al., petitioners. Leave to appeal. Appellate Court, Second, District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court

Supreme Court, U. S.
FILED
SEP 24 1979
MICHAEL RODAK, JR., CLERK

No. 78-1761

IN THE

SUPREME COURT OF THE UNITED STATES

ORRIS BALLARD, ET AL.,
Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

CASES

ARTICLES

No. 78-1761

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OPINION BELOW

Pursuant to Supreme Court Rules 23(1)(b), 24(1) and 40(3), the respondent objects to the statement of the Opinion Below contained in the petition for writ of certiorari. The opinion of the Illinois Appellate Court attached as Appendix A is inadequate on two bases. The opinion is characterized as a split decision with a one judge dissent (Petition at 2) when in fact it was an opinion affirming the judgment of the trial court prepared by Justice Woodard with Justices Seidenfeld and Rechenmacher concurring. *People* v. *Ballard, et al.*, 382 N.E.2d 800 at 802, 810. A more serious objection to the opinion as submitted by the petitioners is the absence of four paragraphs that the respondent considers vital to this Court's proper review. The missing part of the opinion is incorporated in Part I of this opposition brief.

STATEMENT OF JURISDICTION

The respondent objects to the Statement of Jurisdiction as submitted by petitioners. Four persons, the original co-defendants, are identified as petitioners in the instant cause of action. (Petition at title page) However, the record is clear that co-defendant Donald Russell was not a party to the Illinois Appellate Court proceeding, 382 N.E.2d 800, 802, thus petitioner Russell cannot invoke the jurisdiction of this Court. (Supreme Court Rule 23(1)(f). It should also be noted that since no allegations were made in the appellate proceeding nor in the instant petition regarding possible prejudice suffered by petitioner Lawrence Ballard by reason of the joint representation of two of his co-defendants, petitioner Ballard cannot properly request this Court to review a claim of ineffective counsel. Supreme Court Rule 23(1)(f).

INTRODUCTION

The petition for writ of certiorari is based on events alleged to be violative of sixth amendment right to counsel and fifth and fourteenth amendment due process constitutional protections. The respondent respectfully requests this Court to deny the petition for the following reasons. The respondent contends that the arguments raised do not relate to the facts of this case and thus constitute a request for the adoption of a per se rule prohibiting joint representation of co-defendants in criminal litigation. Secondly, the argument related to sufficiency of the indictments is characterized by petitioners as "admittedly a narrow point" (Petition at 4). Since the sole authority offered in support of the second question is an alleged inconsistency between a 1966 Missouri Supreme Court decision and the 1978 Illinois Appellate Court decision, the respondent judges this a nugatory issue not deserving of examination by this Court. Furthermore, the respondent will prove that the decision below is not only a correct judgment on the particular facts but that it is entirely consistent with previous judicial determinations.

I.

THE COURT BELOW CORRECTLY DETERMINED THAT THE TRIAL JUDGE COMPLIED WITH *HOLLOWAY* v. *ARKANSAS* STANDARDS REGARDING THE DETERMINATION OF EFFECTIVE ASSISTANCE OF COUNSEL.

The major argument advanced by petitioners is the conclusion that the actions of the trial judge resulted in a denial of the right to effective counsel contrary to the mandates of this Court in *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). The *Holloway* decision reaffirmed the principle of recognition of the possible appropriateness of joint representation of multiple defendants, *Id* at 482, but held that a timely notice by defense

counsel claiming the existence of conflict of interests triggers a duty on the part of the judge "to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel". *Id* at 484. The Court continued: "[W]hen an untimely motion for separate counsel is made for dilatory purposes, our holding does not impair the trial court's ability to deal with counsel who resort to such tactics. (citations omitted) Nor, does our holding preclude a trial court from exploring the adequacy of the basis of defense counsel's representations regarding a conflict of interests without improperly requiring disclosure of the confidential communications of the client." (citations omitted) *Holloway* at 486.

The respondent maintains that the record below provides adequate evidence that the trial court had reason to inquire into the possibility of dilatory motivation related to the defense counsel's petition to withdraw and further that the record demonstrates adequate provision was made by the trial judge for continued examination of claims of conflict of interest arising during the litigation.

In support of this argument and as additional evidence of the concern demonstrated by the trial judge regarding the rights of the defendants, it is imperative that this Court have access to the omitted parts of the opinion. This material found in the record at 382 N.E.2d 808 contains a responsive statement by the defense counsel regarding a motion to sever that clearly indicates a defense strategy based on a theory of common defense totally inconsistent with subsequently raised claims of conflict of interest. The omitted excerpt also includes the essence of the Appellate Court's analysis of claims of antagonistic defenses as well as its examination of the trial court's procedural determinations. The excerpt is as follows:

> "Your Honor, I would point out for the record that my clients do not care if the case is tried separately or together with Mr. Russell. They feel that they have done nothing wrong and I don't think that it matters to them."

Again during opening statements the defense advances the theme that AITC was a legitimate enterprise and the defendants' efforts to promote it were honest and substantial. Defendants admit that the "blame theory" was never urged at trial. Therefore the antagonistic defenses claim is without merit.

However, defendants have further argued that even where antagonistic defenses are not present, defendants still have a right to a separate trial where a joint trial would be highly prejudicial to any of them. They maintain that the joint trial was highly prejudicial to them due to the introduction of other transactions admitted to prove intent, some of which did not involve all defendants. Prior to trial, the state indicated to the trial court that this evidence linked three of the defendants to other companies. The trial court was of the opinion that if the introduction of this evidence resulted in prejudice to any of the defendants, a mistrial would be declared as to those defendants. When the testimony was introduced, the trial court struck the testimony as to those defendants it did not relate to and admonished the jury to disregard it as to those defendants. Where the only ground for severance is that part of the testimony competent against one is incompetent against the other, there is no abuse of discretion in refusing a separate trial. (*People* v. *Mutter*, (1941) 378 Ill. 216, 37 N.E.2d 790.) Therefore we conclude that no error was committed in denying a severance to defendants.

Defendants have also objected to the evidence of transactions involving other companies on the grounds that they were not similar to the transactions alleged in the indictment. Evidence which proves a fact in issue is admissible though it may evidence that the accused has committed another separate crime. *People* v. *McDonald*, (1975), 62 Ill.2d 448, 343 N.E.2d 489.

People v. *Ballard, et al.*, 382 N.E.2d 800 at 808.

The respondent contends that the *Holloway* requirements were fully complied with by the action of the trial judge. This is apparent after an examination of the facts surrounding the

motions to withdraw representation and the judge's response to those requests.

In the instant case the trial judge ascertained that the defense counsel has been retained by two of the four co-defendants five months before trial. 382 N.E.2d 807, (Petition at 3). The attorney filed a motion to withdraw representation one week before the trial. This motion was argued and denied on the day the trial began. The record indicates that on one additional occasion during the two week trial, the defense attorney "again alluded to a 'possible' conflict that 'could' arise. The trial court indicated that if the conflict did arise the attorney should again consult with the trial court." 382 N.E.2d 807. Based on these facts in combination with the statement by the attorney of a deliberate strategic decision to pursue a common defense not only between his defendants but in conjunction with the other two co-defendants, the Appellate Court concluded that the trial judge had comported with the directives mandated by *Holloway*. *Ballard* at 807. The untimely motion to withdraw followed by the speculative nature of the retained counsel's fears of conflict; the interrogation of counsel combined with the judge's assurance of his willingness to continue to evaluate claims of conflict, all give evidence of full compliance with *Holloway* requirements. Thus, the decision below is correctly predicated on the facts, is based on a proper application of *Holloway* standards and does not warrant review by this Court.

II.

THE PETITIONERS HAVE FAILED TO ADVANCE REASONS NECESSITATING THE RE-EVALUATION OF THIS COURT'S REJECTION OF A PER SE RULE PROHIBITING JOINT REPRESENTATION IN *HOLLOWAY* V. *ARKANSAS* AND *GLASSER* V. *UNITED STATES*.

An "important yet unanswered question, namely whether the tardy nature of the motion to withdraw will defeat a

defendant's right to effective assistance of counsel" is raised by the petitioners (Petition 3). The respondent argues, that although suggestive of a significant legal issue, this question would have been inappropriately directed to the court below. For such a question is in reality a request for a re-evaluation of this Court's rejection of a per se rule prohibiting joint representation announced in *Glasser* v. *United States*, 315 U.S. 60, (1942) and affirmed most recently in *Holloway* v. *Arkansas*, 435 U.S. 475, (1978).

Conceivably, there exist three reasons why a joint representation case would merit review. The Court may wish to evaluate judicial responsiveness to its *Holloway* directives. The two undecided issues in *Holloway* 435 at 482, the degree of notice and certainty of alleged conflicts and the nature and scope of the affirmative duties incumbent on trial judges may be ripe for resolution. Finally, the Court may consider it necessary to once again measure the benefits derived from an absolute bar to joint representation. However, review of the instant case would provide an extremely limited forum for analysis of any of these issues.

Arguments in favor of a rule prohibiting joint representation are systematically raised in various commentaries published prior to and immediately following the *Holloway* decision. Hyman, *"Joint Representation of Multiple Defendants In A Criminal Trial: The Court's Headache"*, 5 Hofstra Law Review 316 (1977); *"The Sixth Amendment and the Right to Separate Counsel"* Case Comment, 16 Houston Law Review 209 (1978); *"Holloway* v. *Arkansas: A Partial Solution To The Problems Inherent In the Multiple Representation of Criminal Defendant"* Case Comment, 45 Brooklyn Law Review 191 (1978). Among the issues raised are avoidance of danger to client confidentiality precipitated by a judicial inquiry into existence of co-client conflicts, elimination of actual conflicting interests arising in areas such as admissibility of evidence, right to testify, plea bargaining efforts, sentence reduction strategies,

effect on judicial economy and unavailability of the utilization of a common defense. There will certainly be future opportunities for the Court's review of one or more of these important issues, but an examination of the facts in the instant case gives evidence of its inappropriateness as a vehicle for review purposes.

If this Court chooses to evaluate judicial performance related to the *Holloway* right to counsel standards it would seem advisable to choose a case tried after April 3, 1978. Interpretation of the standards is more fitting in a case occurring after the promulgation of such standards, which is not true of the present case. The present case also involves co-defendants who were in fact represented by separate counsel unlike *Holloway*. This factor would contribute to the difficulty of determining possible harm to the defendants who had retained the same attorney.

If, on the other hand, this Court wishes to return to the unresolved questions of *Holloway*, the instant case does not offer a sound basis for analysis. The trial judge's willingness to remain responsive to alleged claims of conflict of interest precludes the type of examination that would be possible if there were definitive judicial behavior. The absence of finality in the court's response to counsel's request minimizes the opportunity for analysis.

The motivation to re-examine the rejection of a per se joint representation rule is also marginal due to the facts of the crime and the nature of the defense. Since the theory of a common defense related to lack of business acumen, with the defendants characterizing themselves as victims of a general recession, the utilization of such a joint defense, if not persuasive, appears suitable in a financial crimes prosecution. Differences over plea bargaining opportunities, antagonistic testimony, objections to the introduction of evidence were not of major import here, again, distinguishable from *Holloway*.

Therefore, although recognizing the significance and legitimacy of the question being raised, the respondent urges the Court to withhold review and submits that the petitioners' failure to raise arguments in support of review obviates the necessity warranting such review.

III.

THE HOLDING BELOW VALIDATING THE CONSTITUTIONAL AND STATUTORY SUFFICIENCY OF THE CRIMINAL INDICTMENTS IS CONSISTENT WITH PREVIOUS DECISIONS OF BOTH FEDERAL AND STATE COURTS.

The petitioners argue that the indictments used in their criminal prosecution were insufficient and consequently resulted in a deprivation of due process protection. The respondent contends that the decision of the court below upholding the validity of the indictments is correct, consistant with recognized legal principles and that the solitary judicial determination offered by petitioners to support a claim of conflict is distinguishable both on its facts and in regard to its application of law.

There are three essential elements required for determining the sufficiency of a criminal indictment; that it properly notify the defendant of the nature of the charged offense *United States* v. *Haldeman*, 559 F.2d 31, 181 U.S. App. D.C. 254, *cert. denied Ehrlichman* v. *United States*, 431 U.S. 933, *Mitchell* v. *United States*, 431 U.S. 933, that the indictment set forth the elements of the offense in order that the defendant can prepare for trial, *United States* v. *Roya*, 574 F.2d 386, *United States* v. *Hollinger*, 553 F.2d 535; and that the statement of the offense charged is such that it enables the defendant to avoid the consequences of

double jeopardy. *Sanabria* v. *United States,* 437 U.S. 54, (1978). That the reviewing court evaluated the indictments on each of these basis is certainly evident. After listing similar criteria the court concluded:

> Applying this reasoning to the case before us, the indictment here is phrased in the language of the statute which sets forth all the elements necessary to constitute the offense intended to be punished. The word "theft" is a word commonly understood; moreover the indictment particularizes the charges as theft by deception. The indictment also sets forth the names of the persons whose property was taken as well as the approximate date when the thefts occurred. Moreover, a motion of a bill of particulars was available to defendants; while defendant Russell's motion for such a bill was denied no request for one by the remaining defendants, represented by other counsel, was ever made. As a practical matter, the record demonstrates no difficulty in preparing and presenting a defense and clearly the indictment is sufficient to support a plea of double jeopardy should the need arise.
>
> *People* v. *Ballard* at 804.

The petitioners avoid this evidence and cite instead one case which allegedly substantiates a claim of conflict of decisions, *State* v. *Kesterson,* 403 S.W.2d 606. To claim that the result in *Kesterson* is contrary to the result in the instant case requires an impermissibly narrow reading of the case for it is easily distinguishable. *Kesterson* involved a series of ten separate transfer of monies between the victim and the defendant, not all of which were determined to be part of the overall deceptive scheme. The fact that not all of the transfers were included in the amount of theft charged in the information contributed to the court's determination of insufficiency. More importantly, the decision in the case clearly rested on two separate bases, one of which has no application to the instant case. The *Kesterson* court concluded that the information was insufficient because of the use of generic terms leading to lack of

clarity regarding specificity of the crime charged, but also that the information was fatally deficient because it lacked an essential statutory element, a statement of the victim's reliance upon the alleged deceitful act.

> We hold that § 650.156, in describing the offense of theft by deceit, does use generic terms and that it is necessary that indictments or informations thereunder recite sufficiently the conduct constituting a theft by deceit with which a defendant is charged as to notify him as to the charge against which he must defend himself and likewise be sufficient to bar further prosecution for the same offense. We also hold that the information must charge that the victim relied on the misrepresentations with which defendant is charged. *Id* at 611 The information herein did neither.

Thus, the *Kesterson* case does not constitute a diametrically opposed decision and does not conflict with the opinion of the court below.

CONCLUSION

An examination of the entire record reveals the reasons for unanimity in the court of review's affirmation of the conviction. It is evident that the *Holloway* standards regarding judicial duties triggered by a defense counsel's notification of possible conflict of interest were fully complied with by the trial judge. The petitioners' allegation claiming a conflict in state court decisions evaporates upon a close examination of the sole supporting authority, a decision which is readily distinguishable. Finally, although a debatable question is raised regarding the need for an absolute prohibition against joint representation of criminal defendants, the petitioners have not advanced either a factual basis nor persuasive arguments justifying review of this issue. For the foregoing reasons, respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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